MALEK & JOSEPH AU

v.

BANK BUMIPUTRA MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: C-02-123-1995]
19 SEPTEMBER 1998

EVIDENCE: *Parol evidence rule - Evidence Act 1950, s. 92 - Admission of oral evidence to show existence of collateral agreement - Need for contemporaneity - Evidence Act 1950, s. 92(b)*

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Whether judge had directed himself correctly*

CONTRACT: *Terms - Parol evidence rule - Admissibility of oral evidence to show existence of collateral contract - Evidence Act 1950, s. 92(b)*

The respondent ('the plaintiff') was the proprietor of premises which were leased to the appellant ('the defendant'), a firm of advocates and solicitors. Under the terms of a tenancy agreement dated 18 July 1987, the defendant leased the whole of the seventh floor in the plaintiff's building ('the premises') for a term of three years at an agreed rent of RM3,869 per month.

The defendant failed to pay the rent and the plaintiff sued for vacant possession, arrears of rents and mesne profits. In its defence, the defendant contended that there existed an oral collateral agreement which was admissible under proviso (b) of s. 92 of the Evidence Act 1950 ('the Act'), that the defendant could, at its option, elect to rent only half the premises, and that this induced it to enter into the tenancy agreement. As such, it was only liable to pay half the rent claimed. The defendant relied on a taped telephone conversation with the plaintiff's assistant manager as proof of this collateral agreement.

The High Court rejected the defendant's argument and found that the taped conversation did not indicate that the plaintiff's assistant manager had agreed to grant the option, moreover, the defendant, being a firm of advocates and solicitors, ought to have ensured that the collateral agreement was incorporated into the tenancy agreement. The court granted summary judgment in favour of the plaintiff, ordering the defendant, firstly, to deliver vacant possession of the premises and, secondly, to pay the arrears of rent amounting to

RM66,454.43 and mesne profits of RM546,812.72, to the plaintiff. The defendant appealed against the second part of the judgment.

Held:
Per Siti Norma Yaakob JCA

[1] The tenancy agreement was silent as to whether the defendant could opt to rent only half the premises. The taped conversation was too general to invite any inference that the plaintiff's assistant manager had made a representation to that effect, and the conversation took place almost two years after the defendant had evinced an interest in renting the entire premises.

[2] The defendant, being a firm of advocates and solicitors, could easily have included the option as a term of the tenancy agreement if it was a determining factor in inducing the defendant to enter into the tenancy agreement as alleged.

[3] Section 92(b) of the Act was inapplicable as the documentary evidence indicated that the proposal to rent half the premises originated from the defendant when it was facing cash flow problems eight months after the tenancy agreement had been entered into.

[4] The trial judge had evaluated the evidence thoroughly and had not misdirected himself as he had asked the right questions and arrived at the right conclusion. The trial judge was therefore correct in finding in favour of the plaintiff.

Per Abu Mansor Ali JCA

[1] The trial judge correctly held that the taped conversation did not indicate that the plaintiff's assistant manager had agreed to grant the defendant the option as alleged. The documentary evidence indicated that the defendant had intended to rent the whole premises to accommodate a partner who was resuming his practice with the firm.

[2] An appellate court will not lightly disturb the finding of the trial judge unless there has been an error of law, or where he has acted on the wrong principles or has decided against the weight of the evidence. In this case, the trial judge had acted correctly in finding for the plaintiff.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden ('plaintif') adalah tuanpunya premis yang telah dipajakkan kepada perayu ('defendan tersebut'), sebuah firma peguambela dan peguamcara. Dibawah terma-terma perjanjian sewaan bertarikh 18 Julai 1987, defendan tersebut telah memajak keseluruhan tingkat tujuh dalam bangunan plaintif ('premis tersebut') bagi satu tempoh selama tiga tahun pada sewaan yang telah dipersetujui sebanyak RM3,869 sebulan.

Defendan telah gagal untuk membayar sewaan tersebut dan plaintif telah mendakwa untuk mendapatkan milikan kosong, sewaan-sewaan yang tertunggak dan hasil perantaraan. Dalam pembelaannya, defendan menegaskan bahawa wujudnya satu perjanjian kolateral lisan yang mana boleh diterima masuk di bawah peruntukan (b) s. 92 Akta Keterangan 1950 ('Akta tersebut'); bahawa defendan boleh, atas pilihannya sendiri, memilih untuk menyewa hanya setengah bahagian premis tersebut, dan bahawa ini yang telah mendorongnya untuk memasuki perjanjian sewaan tersebut. Oleh yang demikian, ianya adalah hanya bergantung pada perbualan telefon dengan penolong pengurus plaintif tersebut yang telah dirakam sebagai bukti perjanjian kolateral ini.

Mahkamah Tinggi telah menolak hujahan defendan dan mendapati bahawa perbualan yang telah dirakam itu tidak menunjukkan bahawa penolong pengurus plaintif telah bersetuju untuk memberikan pilihan tersebut, lagipun, defendan, sebagai sebuah firma peguambela dan peguamcara, seharusnya telah memastikan bahawa perjanjian kolateral itu telah digabongkan ke dalam perjanjian sewaan tersebut. Mahkamah telah memberikan penghakiman terus memihak kepada plaintif, yang memerintah defendan, pertamanya, untuk menyampaikan milikan kosong premis tersebut dan keduanya, untuk membayar sewaan-sewaan tertunggak yang berjumlah sebanyak RM66,454.43 dan hasil perantaraan sebanyak RM546,812.72 kepada plaintif. Defendan telah merayu terhadap bahagian kedua penghakiman tersebut.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Perjanjian sewaan tersebut tidak menunjukkan samada defendan boleh memilih untuk menyewa hanya setengah bahagian dari premis tersebut. Perbualan yang telah dirakamkan itu adalah terlalu umum untuk mempelawa sebarang inferens bahawa penolong pengurus plaintif telah membuat satu representasi mengenainya, dan perbualan itu telah berlaku hampir dua tahun selepas defendan menunjukkan minat untuk menyewa keseluruhan premis tersebut.

[2] Defendan, sebagai sebuah firma peguambela dan peguamcara, boleh dengan mudahnya memasukkan pilihan tersebut sebagai satu terma perjanjian sewaan jika ianya faktor penentu dalam mendorong defendan untuk memasuki perjanjian sewaan tersebut sepertimana yang didakwa.

[3] Seksyen 92(b) Akta tersebut tidak boleh dipakai kerana keterangan dokumentar menunjukkan bahawa cadangan untuk menyewa setengah bahagian premis tersebut datangnya daripada defendan ketika ianya menghadapi masalah aliran tunai lapan bulan selepas perjanjian sewaan tersebut dimasuki.

[4] Hakim perbicaraan telah menilai keterangan tersebut dengan teliti dan telah tidak tersalah arah akan dirinya sendiri kerana beliau telah menanyakan soalan-soalan yang betul dan mencapai keputusan yang tepat. Hakim perbicaraan dengan itu adalah betul dalam membuat keputusan yang memihak kepada plaintif.

Oleh Abu Mansor Ali HMR

[1] Hakim perbicaraan telah dengan betulnya memutuskan bahawa perbualan yang telah dirakam itu tidak menunjukkan bahawa penolong pengurus plaintif telah bersetuju untuk memberikan defendan pilihan seperti yang didakwa. Keterangan dokumentar dengan jelasnya menunjukkan bahawa defendan telah berniat untuk menyewa keseluruhan premis bagi menempatkan seorang rakan kongsi yang akan memulakan amalan guamannya dengan firma tersebut.

[2] Ianya merupakan undang-undang biasa bahawa sesebuah Mahkamah Rayuan tidak mungkin akan mengganggu keputusan hakim perbicaraan kecuali terdapatnya kesilapan undang-undang, atau di mana beliau telah bertindak atas prinsip-prinsip yang salah atau telah membuat keputusan yang bertentangan pentingnya keterangan tersebut. Dalam kes ini, hakim perbicaraan telah bertindak dengan betul dalam membuat keputusan yang memihak kepada plaintif.

[Rayuan ditolak dengan kos.]

Cases referred to:

Enshun Properties Sdn Bhd & Ors v. MBf Finance Bhd [1992] 3 CLJ 1519 ***(cit)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187 ***(cit)***

Tan Chong & Sons Motor Company (Sdn) Bhd v. Alan McKnight [1983] 1 CLJ 77 ***(cit)***

Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16 ***(cit)***

Legislation referred to:
Evidence Act 1950, s. 92(b)
Rules of the High Court 1980, O. 14
Subordinate Courts Rules 1980, O. 26A r. 1

For the appellant - B Vendargon; M/s Vendargon & Partners
For the respondent - Tan Weng Hung (Zulkifli Nordin with him); M/s Maydien & Assoc

[Appeal from High Court, Kuantan; HCCS No: 22-38-91]

Reported by Anne Khoo

JUDGMENT

Siti Norma Yaakob JCA:

The dispute in this appeal arises from a tenancy agreement dated 18 July 1987 entered into between the appellant, a firm of solicitors and the respondent, the registered proprietors of the demised premises. Proceedings for vacant possession, arrears of rental and mesne profit or double rent were first commenced in the Sessions Court, Kuala Lumpur in 1989 but the proceedings were later transferred to the High Court at Kuantan by a consent order dated 7 January 1991.

There was at that point of time, a pending application, dated 1 July 1989, by the respondent for summary judgment under O. 26A of the Subordinate Court Rules 1980, but by an order of the senior assistant registrar dated 22 August 1991, the application was converted to an O. 14 application under the Rules of the High Court 1980.

At the hearing of the O. 14 application on 9 May 1994, Lamin Mohd. Yunus, J., (as he then was) ordered the appellant to deliver vacant possession of the demised premises to the respondent within three months of the date of the order ie, on or before 8 August 1994 as the tenancy had already expired by effluxion of time. As for the other claims raised in the application ie, those for arrears of rental and mesne profit, the hearing of such claims was adjourned to another date. There was no appeal lodged against this decision.

At the adjourned hearing of the O. 14 application on 10 February 1995, Arifin Zakaria J, allowed the respondent's claims for:

(1) arrears of rental amounting to RM66,454.43 with interest at the rate of 8% per annum from 14 March;

(2) double rental amounting to RM546,812.72 calculated from 8 March 1989 until 27 January 1995 together with interest at the rate of 8% per annum calculated at the end of each month on the rentals that have accrued; and

(3) costs.

It is against this second order on the O. 14 application that this appeal is founded. Before us, the appellant raised one issue to establish that they have an arguable defence for which they cannot be denied their day in court. Their defence is that they are not liable for the arrears of rental and mesne profit claimed by the respondent as there exists, besides the tenancy agreement, an oral collateral agreement that they had the option exercisable at any time to reduce the renting space of the demised premises by one-half and to pay the rental of that one-half occupied at the reduced rate of half of the monthly rental. As such, their liability is limited to one-half of the monthly rental due for occupying only one-half of the demised premises.

Before considering this contention, I need to highlight some pertinent and relevant clauses in the tenancy agreement so that we can have a clear picture of what actually is in issue.

I start with cls. 1 and 2, by which the appellant agreed to occupy the demised premises, this being the whole of the 7th floor of a building which is now known as Bangunan Bank Bumiputra, Jalan Bank, 25730 Kuantan, Pahang, for a period of three years commencing from 14 January 1987 at a yearly rental of RM46,428 to be paid on a monthly basis at the rate of RM3,869 per month. The tenancy expired on 13 January 1990.

Under cl. 7(a), the respondent reserved the right to re-enter the demised premises and determine the tenancy if the appellant defaulted in their obligation to pay any part of the rentals due.

I need also mention that the tenancy agreement contains an option clause at cl. 6(h) and when read together with cl. 7(d), enable the appellant to apply to renew the tenancy after its expiry for another three years, subject to the other conditions specified in cl. 7(d). The tenancy agreement is, however, silent as to whether the appellant can opt at any time to reduce the floor space of the demised premises by one-half and to pay rentals only for that one-half occupied at half the amount of the monthly rental.

It is not disputed that the appellant made the three months deposit of RM11,607 under cl. 3 and used the demised premises as their offices to conduct their legal practice. That was the only payment they made and thereafter, in breach of the tenancy agreement, they failed to pay the agreed rentals and written demands by the respondent and their solicitors for payment

of all arrears of rental, met with little success. On 1 March 1989, by way of another written notice, the respondent, exercising its rights under cl. 7(e) terminated the tenancy agreement, and demanded vacant possession and payment of all arrears of rental. When there was no response to the notice, the respondent sued the appellant for:

(1) vacant possession of the demised premises.

(2) RM63,414.50 being arrears of rental from May 1987 to February 1989.

(3) double rent or mesne profit at the rate of RM3869 per month from 8 March 1989 to date of vacant possession.

(4) costs, and

(5) and any other relief that the court deems fit and equitable.

From their affidavit evidence, the appellant contend that at the time of negotiating the tenancy, the respondent's assistant manager, one Leonard Boudville had represented that they could at any time opt to occupy one-half of the demised premises and pay the corresponding monthly rental at half the agreed rate and it was this promise that induced the appellant to take up the whole of the 7th floor.

By this defence the appellant sought the protection of s. 92(b) of the Evidence Act 1950, that allows a collateral agreement to exist side by side with the main agreement that it supplements. See the cases of (1) *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16, (2) *Tan Chong & Sons Motor Company (Sdn.) Berhad v. Alan McKnight* [1983] 1 CLJ 77; [1983] 1 MLJ 220 (3) *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte. Ltd.* [1983] 2 CLJ 187; [1984] 1 MLJ 243, (4) *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16 and (5) *Enshun Properties Sdn. Bnd. & Ors. v. MBf Finance Bhd.* [1992] 3 CLJ 1519; [1992] 2 MLJ 137, as authorities for this proposition of the law. As proof of this oral agreement, the appellant relied on the transcript of a telephone conversation with Leonard Boudville, which was taped. The appellant contended that the contents of the telephone conversation go to show that the respondent had promised to allow them at any time to reduce occupation of the demised premises to one-half and to pay for only one-half rentals.

Before us it was argued that there was no rebuttal of this telephone conversation by the respondent. This contention, I consider is misconceived. For there to be a rebuttal there must first of all be proof that the contents of the telephone conversation are acceptable. The learned trial judge rejected this evidence on the ground that it was inconclusive.

I have perused the transcript and it is interesting to note that all references to the oral option came from the appellant with non-committal answers given by Leonard Boudville. At most the latter was only willing to commit that the appellant write to him and he would refer the whole matter of opting to take only one-half of the demised premises, to the respondent. This telephone conversation took place on 28 June 1988, almost two years after the appellant had by their own letter dated 23 July 1986 confirmed that they were 'desirous of renting the whole of the 7th floor" of the demised premises and almost one year after the tenancy agreement was executed. I also find the telephone conversation to be too general as to invite any inference that a representation was made by Leonard Boudville at the negotiation stage to induce the appellant to take up the whole of the 7th floor. In this respect, it must be remembered that the appellant are a firm of solicitors and if indeed the option to reduce the floor space was the determining factor that induced the appellant to take on the whole of the 7th floor, that option could easily have been included in the tenancy agreement as was done in cls. 6(h) and 7(d), the option clauses relating to the extension of the tenancy for another three years after its expiry.

Perhaps the most telling evidence is that found in the appellant's letter dated 8 March 1988, written three months before the telephone conversation and in response to the respondent's numerous letters seeking payment of arrears of rental. In para. 2 of that letter, the appellant tendered a cheque of RM5,000 in payment of part of the rentals due which they admitted stood at RM23,214 as at 15 November 1987 with a promise that the balance would be settled by the proceeds of some insurance claims which they were pursuing. They admitted that they were facing cash flow problems and this was compounded by the fact that the respondent had rejected their application for an overdraft facility. The penultimate paragraph is at para. 3 which reads as follows:

> We further regret to inform you that the premises now rented by us is too large for our requirements. As such, we regretfully propose to take only one-half of the 7th. Floor effective from the 1st. day of April, 1988.
>
> With the current amount of receivables, we are unable to afford the rental for the whole floor. Kindly therefore let us have your consent to our proposal herein.

This letter seals the appellant's fate for clearly it was the appellant who had proposed to reduce the floor space and that proposal only emerged in March 1988, eight months after the tenancy agreement had been executed and when they found themselves to be in financial problems. Clearly therefore the appellant cannot rely on the protection of s. 92(b) of the Evidence Act 1950.

The learned trial judge has considered all the affidavit evidence that I have alluded to and concluded that the appellant have not succeeded in raising any triable issue that ought to go for trial. He found the appellant to be liable for all sums due under the tenancy agreement. I consider this conclusion to have been correctly made for based on what I have stated in this judgment, the appellant have no arguable defence to meet. The learned trial judge has evaluated the affidavit evidence thoroughly, he has not misdirected himself as he had asked the right questions and arrived at the right conclusion.

There appears to be no reason why his decision should be disturbed and on that finding, the appeal was dismissed with costs and the deposit ordered to be paid out to the respondent to account of its taxed costs.

Abu Mansor Ali JCA:

The appellant/defendant appealed to us against the decision of the learned High Court judge at Kuantan given on 10 February 1995 allowing the respondent/plaintiff's application for an order of summary judgment to be entered against the appellant as prayed in para. 10(b), (c) and (d) of the respondent's statement of claim. After hearing arguments we unanimously dismissed the appellant's appeal with costs as it lacked merit and we hereby give our reasons for so doing.

For ease of reference, we will refer appellant as defendant and respondent as plaintiff. It may be pertinent if we were to set down the facts of this case as follows.

From Kuala Lumpur Sessions Court Summons No. 52-712-89 this case was transferred by a consent order to the High Court Kuantan on 7 January 1991. The plaintiff by application dated 20 July 1989 had applied for summary judgment against the defendant under O. 26A r. 1 of the Subordinate Court Rules 1980. And so before the learned High Court judge it came to be dealt as an application under O. 14 of the Rules of the High Court 1980.

The plaintiff prayed for:

(a) vacant possession;

(b) rental for the period from May 1987 to and inclusive of February 1989 amounting to RM63,414.50;

(c) double rental at the rate of RM3869 p.m. from 8 March 1989 until date of actual delivery of vacant possession (27 January 1995); and

(d) costs.

The learned High Court judge found as follows. This claim by the plaintiff arose out of the tenancy agreement dated 18 July 1987 ("the agreement") entered into between the plaintiff and the defendant. Under the agreement the plaintiff leased out to the defendant the whole of the 7th Floor, Bangunan Bank Bumiputra, Jalan Bank, P.O. Box 309, 25730 Kuantan, Pahang ("the demised premises"). The demised premises was rented out at a yearly rental of RM46,428 payable by monthly payment of RM3,869. The plaintiff claimed that the defendant had fallen into arrears of rental and the plaintiff had by itself and by its solicitor demanded payment of the arrears of rental and given notice of the termination of the tenancy to the defendant. The last and final notice of termination being the letter dated 1 March 1989. The defendant failed to comply with the said demand of the plaintiff and hence this claim. The plaintiff then applied for summary judgment against the defendant. The order for vacant possession of the demised premises was granted by this court *vide* order dated 9 May 1994. The matters remaining to be determined by this court are with regard to prayers (b), (c) and (d).

In the affidavit of Kalthsom bte Dato' Haji Kosai, Properties Department Manager of the plaintiff, affirmed on 30 June 1989, the plaintiff claimed that due notice of the termination of agreement had been given to the defendant but the defendant in defiance of the same had failed to pay up the arrears of rental or deliver vacant possession. The defendant through the affidavit of Joseph Au Kong Weng affirmed on 25 September 1989, *inter alia*, stated as follows:

> 4.3 Prior to the agreement dated above, the defendant by a letter dated the 15th day of May 1986, a copy of which is annexed herewith and marked as Exhibit "A", commenced negotiations with the plaintiff for the rental of one-half of the 7th. Floor of the said premises. Soon thereafter, at the suggestion of and in consideration of the representations of the plaintiff Assistant Manager, that the defendant had the option of reducing the demised premises by one half as and when the defendant deems it fit and necessary the defendant rented the whole of the 7th. Floor on the terms stated in the agreement.
>
> 4.5 I say that during the said negotiation, the plaintiff Assistant Manager specifically represented to the defendant that the defendant could opt to reduce the demised premises by one-half at anytime thereafter when the defendant felt that the renting of the whole of the 7th floor was unjustified and uneconomical;

In short the defendant contended that acting on the representation by the plaintiff's assistant manager the defendant agreed to rent the whole of the 7th floor. In exercise of the said option the defendant wrote to the plaintiff and informed the plaintiff of its intention to reduce the renting of the demised

premises by one-half effective from 1 April 1988. The plaintiff, he alleges, had, in breach of the said representation, refused to recognise the said option. The defendant further contended that by reason of the exercise of the option by the defendant the terms and conditions of the tenancy agreement was varied to the extent that as from 1 April 1988, the tenancy is only for one-half of the demised premises at a monthly rental of RM1833.50 and the defendant had regularly rendered the said rental to the plaintiff. To augment its case further the defendant through the affidavit of Joseph Au Kong Weng affirmed on 11 September 1990 tendered what was alleged to be the telephone conversation ("tele-conversation") between Joseph Au Kong Weng and one Leonard Boudville the then assistant manager of BBMB Properties Sdn. Bhd. which allegedly took place on 28 June 1988. The defendant contended that this tele-conversation went to prove the point that the defendant had agreed to take the whole floor on the promise made by Leonard Boudville that the defendant might, if need be, reduce the floor space. That so called promise, the defendant contended, had induced him to take up the whole of the 7th floor.

In reply to the defendant's affidavit of 25 September 1989, the plaintiff, through the affidavit of Che' Lah bin Sulaiman, affirmed on 23 June 1992, denied that there was either a contemporaneous representation from the plaintiff to the defendant or an agreement between the parties that the defendant, while occupying the whole 7th floor, could at his option take only half of the demised premises. The terms and conditions of the agreement between the plaintiff and the defendant, the plaintiff contended, had been reduced into writing and there was nothing more to it than what was contained in the agreement. The plaintiff in the same affidavit further contended that the defendant's letter dated 8 March 1988 to the plaintiff (exh. B to defendant's affidavit in reply affirmed on 25 September 1989) would negative the defendant's own contention that there was such an agreement between the parties to grant the defendant an option to reduce the floor space by half as and when the defendant found it necessary.

The learned judge after having carefully considered the affidavits of plaintiff and defendant came to the following conclusion:

> On examination of this letter I agree with the plaintiff's contention that by the said letter the defendant was making a proposal to the plaintiff for a reduction in the floor space rented by the defendant for reasons stated in the letter. And in the said letter the defendant sought the plaintiff's consent to the said proposal. The letter on its proper construction could not be regarded as an exercise of an option by the defendant.

The plaintiff through the affidavit of Mohd. Jaafar bin Mohd Idris affirmed on 25th of November, 1994 further contends that the agreement between the two parties was reached after several exchanges of letters between the two parties. And contrary to what the defendant had alleged, the plaintiff claims that the proposal to rent the whole floor was made by the defendant as evident by defendant's letter dated 23rd of July, 1986 (page 83 of the Appeal Record) (Exhibit E to plaintiff's further affidavit deposed to by Mohd Jaafar bin Mohd Idris affirmed on 25th of November 1994). Para 2 of the said letter reads -

> We write to inform you that our Dato' Abdul Malek bin Mohamed will be resuming his practice with our firm. As there are space constraints should we rent only one-half of your above building, we now write to inform you that we are desirous of renting the whole of 7th Floor of the above premises.

Following the said letter, the plaintiff then made the offer for renting of the demised premises by the defendant. This offer is contained in the letter of 2nd August, 1986 (Exhibit: "F" to plaintiff's affidavit affirmed on 25th of November, 1994). By letter dated 4th December, 1986 (Exhibit."G" to plaintiff's affidavit affirmed on 25th November, 1994), the defendant accepted the plaintiff's offer.

Before us Mr. Vendargon, for the appellant, contended that there was only one issue before us for decision. He said that there should be a trial and the defendant be given a day in court. The appellant's contention was that from the whole of the evidence there was an oral option given to the defendant while occupying the whole floor they could occupy only ½ of the demised premises whenever they required it. He further contended that the learned trial judge erred in law in not applying the proviso to s. 92 of the Evidence Act 1950 in respect of this oral agreement.

Encik Zulkifli Nordin for the respondent strongly argued that there was absence of any collateral agreement coming under the provision to s. 92 of the Act above. He submitted that the agreement arrived at between the parties was as a result of a protracted negotiation. The assertion in the defendant's affidavit that it was something different and it could include a tele-conversation could never be accepted. Further the possibility that there was an oral option had been denied in no uncertain terms by the plaintiffs and the bank did not agree to the said proposal *vide* p. 77 of the Record of Appeal. The record was clear that the defendant, experiencing some financial problems, was only proposing to take ½ of the floor. That letter was 8 March 1988 and the letter emphasised "we are unable to afford the rental for the whole floor. Kindly therefore let us have your consent to our proposed therein."

For the history of the defendant's coming to rent the whole floor, we have to refer to p. 83 of the appeal record when defendant's letter of 23 July 1986 stated:

> We write to inform you that our Dato Abdul Malek bin Mohamed will be resuming his practice with our firm. As there are space constraints should we rent only one half of your above building, we now write to inform you that we are desirous of renting the whole of the 7th floor of the above premises.

This proposal culminated in the agreement.

The learned trial judge correctly addressed his mind to the defendant's contention of this collateral agreement. He said, at p. 9 of his judgment:

> In its further affidavit in reply affirmed by Joseph Au Kong Weng on 6th day of January, 1995, the defendant maintains that there was a contemporaneous oral agreement between the plaintiff and defendant that at any stage should the defendant wish to surrender one-half of the floor space the defendant would be entitled to do so.
>
> From the several affidavits filed on behalf of the defendant, it appears that the principal ground of the defendant's case is that there was a collateral contract between the plaintiff and the defendant which existed side by side with the main contract. This collateral contract consists of the oral undertaking given by the plaintiff's agent Leonard Boudville to the defendant to the effect that the defendant is free at any time to reduce the floor space as and when the need arises.
>
> The defendant claims that this undertaking by Leonard Boudville had induced the defendant to enter into the agreement with the plaintiff. The counsel for the defendant in his brief reply to plaintiff's submission lucidly stated that the defendant is relying solely on proviso (b) of s. 92 of the Evidence Act 1950. What section 92 provides is that as a general rule evidence of any oral agreement is not admissible as between the parties to contradict, vary add to or subtract from the terms of the written agreement unless the evidence sought to be introduced falls within one of the provisos to the said section. This is some time referred to as the parole evidence rule. Proviso (b) which the defendant seeks to rely on states that -
>
> > (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document;
>
> The proviso is the equivalent of the English doctrine of collateral contract which is enacted into our law of Evidence.

In this long judgment the learned judge very closely and meticulously examined the defendant's contention of oral collateral agreement and the learned judge said:

> On close scrutiny of the transcript, I could not find anything intimating that the agent for the plaintiff, Leonard Boudville had at any time agreed with the defendant that the defendant be given the option to reduce the floor area as and when required. Even assuming for a moment there exist such an intention by the parties, then the next question is what are the terms agreed to between the parties. On the question of rental for example, I don't think it can properly be assumed that in the event the floor area is reduced by half then the rental would be reduced by half. On the contrary the defendant's own letter dated 23rd July, 1986 to the plaintiff (exh. E to further affidavit of Mohd Jaafar bin Mohd Idris affirmed on 25th day of November, 1994) indicated that the reason that prompted the defendant to take the whole floor was because the defendant's partner Dato' Abdul Malek will be resuming his practice. All the letters were silent on the question of the defendant's right of option to reduce the floor space as claimed by the defendant.
>
> Furthermore, if the option is so important to the defendant as the defendant now claims, I could not see any plausible reason why it could not be incorporated into the agreement. The defendant being a firm of solicitors ought to be presumed to have acted on legal advice in entering into the agreement with the plaintiff. In the circumstances of this case, I am of the view that the defendant should not be allowed to add to the express terms and conditions of the agreement based merely on the flimsy evidence that was put before the Court.

And the learned judge concluded:

> For the above reasons I find that the defendant has not succeeded in raising any triable issue that ought to be set down for trial.

The learned judge then gave judgment as prayed.

It is trite law that an appellate court will not lightly disturb the finding of the learned trial judge unless there has been an error of law, he acted on wrong principles or the decision is against the weight of the evidence. In this case we are more than satisfied that the learned judge had acted properly in entering judgment for the plaintiff as prayed for reasons given. We have no reason to disturb his decision. We therefore dismiss the appeal with costs. The defendant appeals.

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